

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1504

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS,
Appellants.

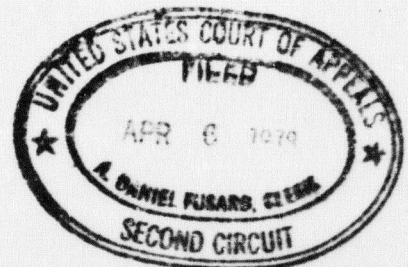
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

Docket No. 77-1504

-vs-

REPLY BRIEF FOR
APPELLANTS

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS

Appellants

This Reply Brief is submitted in response to certain misstatements of fact in the Government's brief, in answer to certain arguments therein not fully anticipated in Appellants' opening brief, and in an attempt to focus the issues in this case. The bulk of the discussion is directed to the issues under the Western District Plan, but parts of the discussion bear on the Sixth Amendment issue.

We note that the Appellants, the Government, and the District Court are in agreement that the November 29, 1973 Notice of Readiness must be disregarded, "that the Notice of July 15, 1976 was the effective notice," and that the determinative question under the Western District Plan is, taking into account the applicable exclusions, whether that Notice was filed within six months of May 24, 1973. (See Govt's Br., p. 10) The crucial question is thus whether the Government has met its burden of showing that enough

time is excludable to reduce the more than three years elapsed time to less than six months; and the dispute between Appellants and the Government is over the excludability of various periods.

The Government concedes that at least 123 days is not excludable (Govt. Br., pp. 10-13):

May 24 - June 28, 1973, from arrest to arraignment: 35 days.

December 21, 1973 - January 14, 1974, from the Suppression Hearing to the filing of the Notice of Appeal: 24 days.*

September 16 - October 21, 1974, from denial of the motion to extend the time within which to file a Petition for Certiorari, to the first status report: 35 days.

March 29 - April 5, 1976, an adjournment requested by the Government: 7 days.

June 24 - July 15, 1976, from reindictment to the Notice of Readiness: 22 days.

Except for March 29 - April 5, 1976, all of the above periods were excluded by the District Court.

The question thus becomes whether any additional periods of time, which together with the conceded 123 (really 125) days add up to six months, were improperly excluded by the District Court. Of course, "the burden

*This should be 26 days. Judge Curtin ruled orally that the evidence should be suppressed at the hearing December 19, 1973, although a written Order was not entered until December 21 (A,2).

of proof is on the Government to establish those times to be excluded from the six months." United States v. Flores, 501 F.2d 1356, 1360 n.1 (2d Cir. 1974).

We submit that the Government has failed to meet this burden as to a number of periods, totalling well over the 55 days necessary to require reversal.

December 4, 1975 - May 7, 1976

The period from the denial of the suppression motion December 4, 1975, until dismissal of the first indictment May 7, 1976, a total of 158* days, must all, or nearly all, be counted against the Government.

Judge Curtin excluded the entirety of this period, stating only:

"After the Court made its suppression ruling on December 4, 1975, the case was on the trial calendar and [therefore?] no delay can be attributable to the Government." (A,91)

*The Government refers to the period "December 9, 1975 - May 4, 1976." (Govt. Br. p. 13) The first date is apparently a typographical error: suppression was denied December 4, 1975 (A,3;R,17). The second date is properly May 7, 1976: under the Plan time runs unless excluded, and it is only the time when no charge is pending, hereafter May 7, that does not run against the Government. See United States v. Flores, supra., 501 F.2d at 1359-60.

But the Court's exclusion of this period is surely wrong: there is no exclusion provided in Rule 5 of the Plan for the time spent on the trial calendar.*

The Government's argument for the exclusion of this period relies on the assertion that Defense Counsel "asked for and received several adjournments." (Br. p. 13) We submit that this is wrong. The Plan does exclude

"periods of delay resulting from a continuance granted by the District Court at the request of, or with the consent of, the Defendant or his Counsel, in writing or stated upon the record." Rule 5(b) (emphasis supplied)

But there is nothing in this record suggesting that the Defendants requested any of these continuances in writing, nor is there anything stating upon the record Defendants' or Defense Counsel's consent to these adjournments. Rather, these were the delays incident to the overloaded docket in the Western District. See United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977).

*In the ordinary case, of course, no such exclusion would be needed, as the Government would have filed a valid Notice of Readiness before a case was placed on that calendar. But here, where through the Government's negligence the case was not in fact ready for trial and the original Notice of Readiness was (as the Government now concedes) a nullity, all of this time must be counted against the Government, in the absence of a specific exclusion.

Such consent, we submit, cannot be inferred merely from the fact of the adjournment -- from the bare marking on the docket sheet that the matter was adjourned. The specific language of the Plan, requiring that such consent be "in writing or stated upon the record" forbids such an inference: rather, unless the record specifically indicates consent to such a continuance, the time should not be excluded. We submit that, on this record, the Government has not met its burden of showing the excludability of any part of the time December 4, 1975 - May 7, 1976.

Even if the adjournments indicated on the docket sheet (A,3) are deemed to be consented to by the Defendants, not all of the time December 4, 1975 - May 7, 1976 is excludable, on close analysis. Even if we assume that, seemingly contrary to the spirit and language of the Plan, the time can be tolled indefinitely by such notations as "Adj. to the ready calendar" (A,3: docket entry for January 9, 1976), no adjournment whatever (implicitly consented to or not) is indicated on the docket sheets for the periods December 4 - 15, 1975 (11 days), December 23, 1975 January 9, 1976 (17 days), and April 26 - May 7, 1976 (11 days), a total of 39 days, which is excludable under no conceivable reading of the Plan. In addition, nothing appears to suggest consent to any adjournments from the April 5 trial date set by notice of March 15, 1976 (A,49)

to the April 20, 1976 meeting with counsel noted on the docket sheet (A,3). An additional 15 days must be counted against the Government here, for a total of 54 not excluded, even under the most permissive reading of Rule 5(b).

In sum, even if the adjournments indicated on the docket sheet are excluded, 54 days must be counted against the Government during the period December 4, 1975 - May 7, 1976, bringing the total (when added to the 125 days conceded by the Government) to 179 days, just short of the time necessary for reversal. (If the entire period is counted as running, the delay exceeds the allowable six months and this Court need go no further.)

October 21, 1974 - December 4, 1975

The Government argues that this entire period should be excluded. But analysis similar to that above leads to the conclusion that much of this time (at least from October 21, 1974 - January 14, 1975) may not be excluded. The October 21, 1974 on the docket sheet states only "status report. Adj. to 12-9-74" (A,3)* Again,

*The District Court states (A,88) and the Government asserts (Br., p.5) that Defendants did not appear at that status report. This is without support in the record. Although the docket sheet on several occasions notes that no appearance was made for Defendants (or one of them), no such notation is present for October 21, 1974. The most reasonable inference is that Defendants appeared. (But cf. the entry for September 3, 1974: "Status report...Adj. to 10/22/74." It may be that Defendants were notified to appear October 22 instead of October 21, in which case surely no consent can be implied to the adjournment granted on October 21.)

nothing appears to suggest consent "in writing or stated upon the record."

(If the Defendants did not appear for the October 21 status report, no consent could be implied to a lengthy adjournment, particularly where it seems clear from the next entry that the record previously forwarded to the Court of Appeals for the first appeal was not then available at the District Court. The delay here was therefore caused not by the Defendants or with the Defendants' consent, but was caused rather by the unavailability of the file.*)

*This is equally true if the file had previously been returned to the District Court by the Clerk of this Court, contrary to Judge Curtin's assumption on December 9, 1974 (A,2). If the file had been returned at the time of the filing of the mandate September 9, 1974, and merely misplaced at the District Court, the delay would still be caused other than by the Defendants.

The December 9, 1974 and January 13, 1975 docket entries similarly do not affirmatively show that the Defendants consented to a continuance "in writing or on the record." (Nor do they show, despite the District Court's statement (A,89), that the Defendants failed to appear at these.) On January 13, 1975, it was agreed that the "suppression hearing must be completed" and that the Court would set a "date for continuance of hearing." (A,2) On March 31, 1975, the Court set that hearing for April 22, 1975. Nothing appears to show why it was not then held. The next entry, for May 19, notes only "Adj. to 6/18 at 10:00 a.m." (The hearing was finally held June 18, 1975, at which time new counsel* for Sebastian requested a continuance in order to put in psychiatric testimony on the issue of the voluntariness of the statement given by Sebastian. (R,13 pp. 114, 117-18). This request was withdrawn by letter September 12, 1975, which asked the Court to decide the suppression issue on

*The Government's brief attempts to attribute delay to the change of counsel for Defendant Sebastian, and the time supposedly necessary for new counsel to become familiar with the case (Govt. Br., pp. 12, 17-18). Government Counsel, looking back over these protracted proceedings, has apparently forgotten the fact that Mr. Collesano, original assigned counsel for Sebastian, and Mr. Abramowitz, formally substituted for him (see June 18 and July 7, 1974 docket entries, A,2) were law partners (see letters at A,44,46; R,13 pp. 81-82, 119-20) and Mr. Abramowitz had previously appeared in connection with this case. The docket entry of June 18, 1975 clearly shows that the change in the CJA 21 was merely to "reflect" the

the record as it then was. (A,44-45; see also letter at A,46)

Nothing in the docket sheet or elsewhere in the record indicates that any of the above delay (except that for June 18 - September 12, 1975) is attributable to continuances granted "at the request of or with the consent of" the Defendants, "in writing or stated upon the record." The time is thus not excludable under Rule 5(b).

January 14, 1974 - September 16, 1974

The Government responds to our argument that the time taken by the first appeal with the contention that the Government was required to take that appeal in order to be able to introduce certain "crucial and necessary evidence" (Govt. Br., p. 11). But that sidesteps the central thrust of our argument: that the Government provoked the suppression here. Even though the Jencks Act issue had no real importance for the Government here (as shown by the later turnover of all of the withheld materials) the Government shows this minor prosecution (rather than another, more

Footnote continued:

substitution that had previously taken place.. No delay can be attributed to the substitution. (We do not disagree that the continuance from June 18, 1975 - September 12, 1975 is excludable as a continuance reflected in the record. See transcript, R,13, pp. 114, 117-18)

serious prosecution) to test Judge Curtin's view of the Jencks Act in this Court. Under the circumstances the delay should be wholly charged to the Government. (Even if the delay is not charged to the Government under the Plan, in that Rule 5(a) literally excludes time expended on interlocutory appeals, this time should, in the circumstances of this case, be counted against the Government for Sixth Amendment purposes: the Government sought vindication of its interests in disregard of the Defendants' interests, where the Government's position had no necessary connection with this case.)

* * *

Appellants submit that, as the above periods of nonexcludable delay far exceed the six months allowed before the Government was ready for trial, the conviction on the superseding indictment here should be reversed and the indictment dismissed. In the alternative, Appellants submit that, as more fully argued in Appellants opening brief, the conviction should be reversed and the indictment dismissed by reason of the violation of Appellants' Sixth Amendment right to a speedy trial.

Respectfully submitted

Dated: April 4, 1978
Buffalo, N. Y.

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77-1504

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